their communications from the end office to an IXC point of presence and during interexchange transport misses the critical fact that their use of the premises to end office circuit is within the plain language of the Act's definition of telecommunications.

The FCC Should Not Redefine Interstate Access as Local Service By Inviting Interstate Carriers to Evade Interstate Access Charges Simply by Ordering the Same Serving Arrangements As Unbundled Access Elements

The FCC has also distorted cost recovery and jurisdictional boundaries by allowing interexchange carriers to order the interconnection they have long used for interexchange access as unbundled network elements, subject to state pricing authority. The result abdicated the FCC's jurisdiction over a potentially huge proportion of the arrangements for local pickup and delivery of geographically interstate traffic and has led to proposals to allocate the costs of such legally interstate access service to the intrastate jurisdiction. The FCC should revise its interpretations of the definition and scope of unbundled network elements to prevent the unjustified shifting of costs that interstate ratepayers should shoulder into the rates charged for local service, in clear contravention of Smith v. Illinois Bell Tel. Co., 282 U.S. 133 (1930).

The FCC Should Take Advantage of the Report to Congress to Remedy Other Flaws in Interpretation and Implementation of §254 and Coordination with Other Regulatory Reform Efforts that Undermine the National Universal Service Commitment

1. The FCC Should Allow Rural ILECs to Disaggregate Their Support Payments to Alleviate Harmful Market-Distorting Bypass Incentives

In a January 12, 1998 speech to OPASTCO (OPASTCO speech) (p.5), the FCC's new Chairman demonstrated his conceptual understanding of the error of the FCC's transitional support distortion in rural areas — providing the CLEC with the ILEC's study-area-wide per-line support, instead of disaggregating the support to track the cost variations as the RTC urged.

Said Chairman Kennard,

> eventually small companies will need a much more highly deaveraged universal [service] support system than exists today. It does not cost the same to provide service downtown as it does when you move outside the town limits. Anyone who drives through any rural town in America can see this. Ultimately, our regulations should move in the direction of reflecting that reality.

The Chairman is correct, except that "eventually" and "[u]ltimately" are not soon enough, since the distorted entry signals for rural bypass are in effect right now, during the rural transition. The FCC should permit such disaggregation during the rural LEC transition, using density zones or some other non-burdensome method to reflect cost differences.

2. The FCC Should Not Arbitrarily Cap the Level of High Cost Support

The FCC's interim support program for rural telephone companies, shaped on the RTC and USTA proposal with limited adjustments, provides for reasonable growth during the transition period until the FCC can discover how to make a TELRIC proxy work for the varied patterns of high cost support needs for rural LECs. However, the FCC should recognize that the indexed cap cannot relieve the FCC of responsibility to provide and maintain "specific" and explicit federal universal service support at levels "sufficient" to achieve §254's universal service purposes, including rural access to advanced telecommunications and information services and reasonable rural and urban parity with respect to services and rates. The FCC recently said that the interim support would be sufficient because no rural LECs have sought waivers. That test does not comport with the statute because the FCC is charged with providing sufficient support to achieve the federal universal service definition, which Congress also expects to evolve over time. Given the explosive growth of the Internet, for example, placing the burden on small and rural LECs to prosecute waiver requests to bring their support up to a sufficient level violates the directive Congress gave the FCC.

3. The FCC Should Not Limit Support for Acquired Exchanges to the Seller's Per-Line High Cost Support

The statutory requirements for "sufficient" support to achieve specific rural service and comparability principles also stand in the way of the FCC's freeze on support to rural exchanges acquired from another carrier. The exchanges that have been purchased in recent years have typically required upgrades that a smaller, more rural ILEC was willing to provide, but that had not been provided by the selling ILEC. The seller's per-line support under the pre-Act and pre-proxy support mechanisms reflects both the lower costs of service to densely-populated metropolitan areas and the depressed costs of unimproved rural exchanges. Both are certain to be less than the buyer's cost of upgrading and serving the high cost area. Limiting the buyer to what the seller received per line necessarily results in support that is not sufficient for providing universal service and a modern network to the acquired rural exchanges. The FCC should terminate its support ceiling for acquisitions as inconsistent with the objectives of §254.

4. The FCC Should Not Redefine the High Costs Eligible for Universal Service Support as the Costs of an Imaginary, Optimally Efficient New Network Designed Today to Serve All the Customers in a Specified Geographic Area

In its May 8, 1997 order on universal service the FCC endorsed the Joint Board's recommendation that federal universal service support should be calculated by determining the forward-looking economic cost of providing the supported services reduced by a nationwide revenue benchmark calculated on the basis of average revenue per line. While the order went on to delay the application of such an approach to rural markets until at least January 1, 2001, the

RTC has participated in the proceedings to construct such a model for non-rural markets and believes the record there shows that the approach will not work for rural or any other markets.

The RTC is concerned because the FCC's intended proxy model for determining universal service support is based on a non-existent, optimally-configured, hypothetical network that cannot be proven to calculate the true forward-looking costs of any existing carrier, let alone the true costs of the existing carrier or a market served by more than a single optimal network that serves all the customers in the area. The realistic fear is that a model based on a hypothetical scenario will understate the actual forward-looking costs of providing universal service. Indeed, two proponents of one model, AT&T and MCI, admit that: "Models are, of course, tools of estimation, and no model -- either a cost model or ILEC study -- can be expected to achieve absolute precision on all (or, indeed, any) fronts...." It is foolish to rely on such an inaccurate means to satisfy the §254 requirement for "sufficient" federal support to carry out the national universal service principles in that provision.

Indeed, the RTC believes actual embedded cost is the only truly reasonable measure, not the theoretical forward-looking incremental costs the FCC thinks the ILEC should incur if it started from a "blank technological slate." Professor Alfred Kahn has cautioned the FCC that a network in a competitive market is a blend of the old and the new, with the new displacing the old when and where the economics justify the use of capital. The problem with the proxy model approach is that it relies on a simplistic flash-cut to the latest technology based on the most "cost-effective" use of that technology to meet all demand in an instantaneous, hypothetical manner. Such a network will never be constructed, and the development of any degree of competition will simply fragment the demand among the carriers and their networks and further invalidate the model.

The new Commissioners should reconsider the economic and public policy drawbacks of the drive to impose regulators' current theory about the costs in a perfectly competitive market on a market in transition. Especially when it comes to universal service programs necessary to prevent the marketplace from neglecting some areas and customers, the FCC should not conduct a nationwide economic experiment where the stakes are the access to communications and information resources for rural and low income customers.

5. The FCC Should Recognize the Interrelationship Between its Orders and Actions and the Effect They Could Have in Frustrating the Intent of Congress With Regard to Providing All Americans the Benefits of Universal Service.

The RTC has urged the FCC to recognize the interrelationship between its many orders and actions and the effect they could have in frustrating the objectives of one another and Congress's universal service commitment. The implementation of the 1996 Act's universal service and local competition provisions are affected by and affect issues raised by access and separations reform. Also closely related are decisions about the nature and pace of reducing ILECs' heavy regulation burden, which puts them at a disadvantage in competing with virtually unregulated providers. The FCC needs to assess the cumulative impact of all its decisions and proposals and fashion a comprehensive body of policies and rules that will work together towards the fundamental aims of the 1996 Act — a transition to competitive telecommunications markets, strong, evolving and affordable universal services nationwide, and removal of unnecessary and burdensome regulation.

6. Universal Service Requires that Consumers Be Able to Monitor and Enforce the Toll Rate Averaging and Rate Integration Requirements in §254(g)

One example of failed implementation involves the FCC's geographic toll rate averaging proceeding, CC Docket No. 97-160. The FCC first required nondominant interexchange carriers to make information concerning "current rates, terms and conditions for all of their interstate, domestic, interexchange services available to the public in at least one locality during regular business hours.[12] The RTC, Alaska and Hawaii petitioned for reconsideration because a single disclosure location would impair access to the information necessary to enforce the §254(g) requirements for rate averaging and rate integration.. Brushing aside the RTC request that rate information be available on-line and in at least one public place in each state, [13] the Commission eliminated the disclosure requirement altogether.[14] The result is that no consumer can determine whether or not rates charged for long-distance service are the same elsewhere in the nation for a call of similar time, distance, and duration, as the law demands.

The FCC should reinstate the public disclosure requirements and require on-line and state-by-state posting of rates.

7. The Continued Study of Competitive Bidding for Support Is Unwarranted, Wasteful and Would Frustrate the Intent of Congress.

There is no justification for the FCC's decision to continue examining the use of competitive bidding as a means of choosing eligible carriers. There was and is no viable Congressional support for this scheme. Furthermore, there is no legal basis for the use of

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[12] Second Report and Order (Order), In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, CC Docket No. 96-61, FCC 96-424 (rel. October 31, 1996) at 47, para. 84.

[13] RTC Petition for Partial Reconsideration, at 5 (filed December 23, 1996).

[14] Reconsideration Order, para. 69

auctions to decide what carriers are eligible for federal support.[15] In fact, highly erratic competitive bidding is directly at odds with the Act's requirement that the FCC establish "specific," "predictable," and "sufficient"[16] federal support mechanisms. Additionally, the authority to designate eligible carriers is given to the states, not the FCC.[17] Section 214 does not even hint that Congress intended state commissions charged with "designating" eligible carriers for specific high cost "service areas"to substitute unpredictable auctions for the careful weighing of the public interest that Section 214(e) requires. The FCC's recent experience with results in the broadband PCS and Wireless Communications Services auctions are a warning that the theoretical results predicted by auction proponents may fall short of the reality, disappoint proponents and disserve the public interest..[18]

Even if the FCC had such authority or if it worked with the states to compel all state designated eligible telecommunications carriers to bid, competitive bidding still could not satisfy its duty to ensure that consumers receive "quality services."[19] The goal of any least-cost bidder

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[15] Section 309(j) of the Act is evidence that Congress knows when to authorize competitive bidding as an alternative to comparative hearings and other procedural mechanisms for deciding public interest issues.

[16] 47 U.S.C. Section 254(b)(5).

[17] 47 U.S.C. Section 214(e).

[18] *See,* In the Matter of Amendment of Part 1 of the Commission's Rules on Competitive Bidding Proceeding, (WT 97-82), Public Notice, (DA 97-679), released June 2, 1997 where the Commission seeks comments on what measures it might take to accommodate defaulting bidders in the PCS C block auctions. Also, the Commission is aware that it only raised $13.6 million of the $1.8 billion Congress expected it to raise in the Wireless Communications Services auctions.

[19] 47 U.S.C. Section 254(b)(1).

implicitly conflicts with the obligation to provide the highest level of service. Additionally, support is unlikely to be "sufficient." Since competitive bidding envisions that all eligible carriers will be limited to low bid support, the system invites cream skimming and degradation of service for those high cost customers that will not be targeted by the low cost bidder.

The FCC should refrain from any further consideration of this flawed and extra-statutory concept.

8. The FCC Should Not Strain the Language of the Statute to Extend "High Cost" Support to Competitors Based on the ILEC's High Costs or for Using the ILEC's Network without Investing in Any Facilities

The FCC has determined that per-line universal service support, including that for Dial Equipment Minute (DEM) weighting, Long Term Support (LTS) and universal service, will be "portable" to whatever carrier serves the line. It bases this decision on the §254 directive that eligible telecommunications carriers must use universal service support for "the provision, maintenance, and upgrading of facilities and services for which the support is intended."[20] From this, the FCC reasons (US Order, ¶286) that when a line is served by an eligible carrier through the carrier's "<u>owned</u> and <u>constructed</u> facilities" (emphasis added), the support should flow to the carrier that incurs the economic costs of serving, that is, to the ILEC or CLEC that owns and has built the serving facilities.

The RTC does not contest this concept of the portability of support. However, the FCC has established that CLECs will receive support based on the embedded costs incurred by the ILEC. The FCC has decided that, until it figures out how to model forward looking costs, CLECs will receive support based on the embedded costs of the <u>ILEC</u> "for the *provision*,

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[20] In the Matter of Federal State Joint Board on Universal Service, CC Docket No. 96-45, paragraph 286.

maintenance and *upgrading* of facilities and services for which the support is intended." Under the FCC's own reasoning, the "specific" support based on ILEC costs can only logically be intended for the facilities "owned and constructed" by the ILEC.[21] The FCC's interpretation not only gives preferential treatment to the competitors, but also violates the §254(k) prohibition against using services that are not competitive to subsidize services that are subject to competition. In fact, that section directs the FCC to establish any cost allocation rules, accounting safeguards, and guidelines that are necessary to ensure that federally defined universal services "do not bear more than a reasonable share of the joint and common costs of facilities used to provide those services."[22] Assuming that the CLEC's voluntarily incurred costs (which the FCC does not even choose to ascertain) are less than those of the ILEC, to pay CLECs, at nationwide ratepayers' expense, for windfall support based on the ILEC's costs, flouts the will of Congress. Consequently, the FCC should not base the CLEC's "portable" universal service support on the embedded cost incurred solely by the incumbent LEC.

The FCC's loose and uneven-handed manipulation of statutory language does not stop with paying Peter for Paul's expenses. The 1996 Act states in §214(e)(1)(A) that a carrier can be eligible for universal service funding if it provides universal services through "its own facilities or a combination of its own facilities and resale," but not if it provides service only through resale. Nevertheless, in the US Order, the FCC laid out several pages of semantic contortions to justify allowing a competing LEC to purchase unbundled network elements (UNEs), simply another way of using facilities"owned and constructed" by the incumbent, never construct a facility, and still be eligible for universal service funds.

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[21] 47 U.S.C. Section 254(e). Emphasis added.

[22] 47 U.S.C. Section 254(k)

The FCC's argument revolved around a spurious exchange in the meanings of a carrier's "own" facilities and "owned" facilities to arrive at the bizarre conclusion (US Order, ¶159) that "unlike the term 'owned by,' the term 'own facilities' reasonably could refer to property that a carrier considers its own, such as unbundled network elements, but to which the carrier does not hold absolute title." Consequently, the FCC turned a provision restricting support to a carrier that invests in at least some of "its own" facilities, rather than merely paying to use the existing carrier's network to serve an area, into a way to provide high cost support at nationwide ratepayers' expense for a carrier that uses only other carriers' facilities, which need not be high cost facilities and may even be located in a different, low cost service area. The result is at odds with both the distinction Congress intended to make between the underlying facilities-based carrier and a derivative or "piggy back" provider and with the FCC's standard for carriers that should get portable universal service funding, discussed above, that is, the ILEC or CLEC providing service through its "owned and constructed facilities" because "the support flows to the carrier ... incurring the economic costs of serving that line."

The FCC should use and read the language of the statute consistently and interpret these provisions in keeping with the logical objectives of limiting ratepayers' support to carriers that actually invest in high cost portions of the nation's telecommunications infrastructure. The result should be to limit any eligible carrier's "specific" federal support to high costs that the carrier itself has actually incurred.

9. The FCC Should Not Forcibly Combine Separate Study Areas

The FCC adopted the "definition" freezing study areas as part of the 1984 universal service mechanism. Its primary purpose was to "ensure that ILECs do not place high-cost exchanges within their existing service territories in separate study areas to maximize payments from the .... USF .... support program."[23] The Joint Board recommendation the FCC endorsed in adopting the freeze stated that the freeze would allow a holding company to choose whether to add a later-purchased company to the companies it owned in a state without merging its study areas in that state. [24] The question of when study area consolidation is warranted is the result and an integral part of existing universal service policy: Universal service modifications implementing the 1996 Act, including the mandatory consolidation proposal, can only be decided with the full participation of the Section 254 Joint Board, which is not yet involved in making this decision.[25]

The RTC believes that the proposal for mandatory consolidation conflicts with the Act and what the Section 254 Joint Board has done and intends to do in the future. First, forced consolidation would violate the Section 254(e) directive to make support "explicit".[26] Cost averaging across corporate boundaries and non contiguous areas creates new implicit subsidies among the consolidated areas' high and low cost customers. Consolidation is also not consistent with FCC decisions. In Universal Service, the FCC stated (para. 193) its intent to use study areas to determine support at least temporarily, but committed itself in the near future to following the Joint Board's recommendation to calculate universal service support using smaller geographic

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[23] Request Clarification Filed by the National Exchange Carrier Association, 11 FCC Rcd 8156 (Common Carrier Bureau, 1996) (NECA).

[24] NECA, para. 7, quoting the 1984 Joint Board decision. The FCC interpreted this precedent as showing that a study area waiver was not necessary to keep a separately incorporated company as a separate study area. Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 5 FCC Rcd 5974, paragraph 5 (1990) (1990 NPRM)

[25] Universal Service Order, para. 190.

[26] This is unlike the Act's specific requirement that interexchange carriers geographically average their toll rates so that rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. 47 U.S.C. Section 254(g).

areas to target support better. The FCC also left the question of service areas primarily to the states, as Section 214(e) requires, but urged the disaggregation of non-contiguous parts of a study area.[27] It is nonsensical to impose jurisdictional boundaries here for yet another geographic unit here, particularly when §254(d), (e), (f) and (k) all require jurisdictional distinctions in implementing universal service. Moreover, this involuntary consolidation would undermine the interim the FCC approved interim rural ILEC universal service plan, carefully revised to provide enough support for those companies and those customers.[28]

To solve the problem of excessive waiver requirements by a fiat for consolidation flies in the face of the 1996 Act's deregulatory goal and the FCC's own past thinking and substitutes more government micro-management for market-based ILEC business and efficiency judgments. The proposal should be rejected and should be replaced by a streamlined waiver process.

10. The FCC Should Not Impose Upgrade and Investment Requirements on ILECs Unless It Also Provides a Cost Recovery Mechanism

It wreaks havoc when small and rural telephone companies face federal upgrade mandates without established cost recovery mechanisms. Unlike the larger telecommunications companies, small and rural carriers cannot spread their investments for expanding and improving their networks over many locations and years, but must incur lumpy investment costs for periodic upgrades to make the most of their inherently limited economies of scale. have to upgrade in reserves available for infrastructure investments. Piecemeal software upgrades, for example, can cost more than a carefully phased improvement plan. This is particularly true if the federal

[27] Universal Service Order, para. 190.

[28] Id. Paragraphs 294, 297-99.

mandate is one that disrupts an organized, budgeted and carefully scheduled modernization program for upgrades to meet customer demand or respond to competition.

The FCC's practice of requiring changes in multiple proceedings without any effort to ensure efficient investment is a growing burden for small and rural ILECs. For example, the FCC has required number portability, payphone codes, longer CIC codes, Caller ID blocking or unblocking and a lengthening list of network changes, all involving costs, and often without specifying how the changes will be compensated. Coordinating compliance may interrupt ongoing plans and installations or raise their costs. Whether the requirements stem from implementation of the 1996 Act, FCC initiatives or other legislation,[29] the FCC should realize that providing area-wide rural service and modern facilities to a limited customer base requires careful husbanding of resources. Unexpected mandates can seriously impair a carrier's ability to compete, but also to offer quality services at reasonable rates to its customers. The FCC should address in each proceeding considering cost-causing federally-imposed requirements how the costs will be recovered and how the upgrades will fit in with other mandatory and voluntary network improvement measures. It should also grant waivers and extensions whenever necessary to prevent overburdening rural companies or to foster more cost effective upgrade programs.

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[29] A case in point is the Communications Assistance for Law Enforcement Act, also known as CALEA. The passage of CALEA was a response to complaints by law enforcement agencies that new telecommunications technology impeded their efforts to conduct wiretaps and trace messages. CALEA requires LECs to make it easier to conduct lawful wiretaps and authorized limited spending to compensate them for making the changes, although not necessarily in a timely fashion. The wiretapping capability must be included in upgrades to the carrier's network, at the carrier's expense.

Conclusion

The unusual mandate from Congress for the FCC's report on universal service implementation demonstrates the high level of concern among many lawmakers with keeping the promises they intended in adopting the 1996 Act. It is also an unusual opportunity for the new Commissioners to step back, prepared by their confirmation hearings with deeper understanding of the language and intent of the universal service provisions, and plot a course for changes to effectuate the law's principles, avoid protracted litigation and wasted resources in contending for strained and invalid interpretations and speed the process of achieving the landmark legislation's overarching trilogy of commitments to fostering competition, ensuring nationwide participation in the telecommunications and information era, and freeing telecommunications from costs and burdens that slow the nation's public switched network from reaching its full and continually advancing potential.

Respectfully Submitted,

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January 26, 1998

CERTIFICATE OF SERVICE

I, Sheila V. Hickman, a secretary in the offices of Koteen & Naftalin, hereby certify that true copies of the foregoing Comments of Rural Telephone Coalition have been served on the parties of the attached service list, via first class mail, postage prepaid on the 26th day of January, 1998.

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